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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, *et al.*,
Petitioners,

v.

ROCHAMBEAU WINES AND LIQUORS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA) respectfully move this Court for leave to file the attached brief amici curiae in support of Petitioners.[1]

NABCA is a Wyoming non-profit corporation whose members are the 18 states (Alabama, Idaho,

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[1] Petitioners have consented to the filing of this brief and their letter of consent has been filed with the Clerk of the Court. Respondents have not consented.

Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) which directly control the distribution and sale of alcohol beverages within their borders under the Twenty-First Amendment through government-operated wholesale and, in some cases, retail outlets. In addition to the enumerated states, Montgomery County, Maryland is an Active Member of NABCA and the North Carolina Association of ABC Boards is a Participating Member. These jurisdictions are commonly referred to as "control" states.

NABCA member jurisdictions not only operate wholesale and retail establishments, they also perform licensing and regulatory functions with regard to private alcohol beverage distribution channels within their jurisdiction. These jurisdictions are also responsible for the enforcement of laws pertaining to alcohol beverage distribution.

NCSLA is an unincorporated organization which represents the remaining 32 states, often called "open" or "license" states. In these jurisdictions, the state government acts only in a licensing, regulatory and enforcement capacity, have chosen, pursuant to the Twenty-First Amendment, to permit the distribution of alcohol beverages to be accomplished entirely by the private sector.

Thus, together, the NABCA and NCSLA member jurisdictions represent all 50 states.

Because the illegal interstate distribution of alcohol beverages is approaching $1 billion annually, according to some estimates, and because states have been frustrated in their efforts to enforce their laws

through jurisdictional challenges to such enforcement efforts, the amici have a great interest in the outcome of this matter.

Respectfully submitted,

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March 5, 1998

QUESTION PRESENTED

Whether a State has a right of action in a federal court to enforce the prohibitions contained in the Webb-Kenyon Act, 27 U.S.C. § 122, against an out-of-state seller whose direct shipments to consumers within the State violate that State's laws?

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BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney,[1] file this brief as amici curiae supporting the position

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[1] Counsel for the amici was the sole author of this brief. No party other than the amici made a monetary contribution to the preparation and submission of this brief.

of the Petitioners and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the Eleventh Circuit in *Florida Department of Business Regulation v. Zachy's Wine and Liquor, Inc., et al.*, 125 F.3rd 1399 (11th Cir. 1997).

INTEREST OF THE AMICI CURIAE

The interest of the amici is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE

Alcohol beverages constitute one of the most highly regulated lawful commodities available in commerce. The American experience with this product includes a history of taxation and regulation dating back to colonial times. With few exceptions—the federal excise tax and the failed experiment of Prohibition being the prime examples—most of the regulation of alcohol beverages has taken place at the state level.

While much of the regulation has taken place pursuant to the Twenty-First Amendment, which repealed the Eighteenth Amendment and gave states specific authority to regulate the distribution and sale of alcohol beverages within their borders, state regulation of the product, particularly with regard to the manner and method of sale, predated the national Prohibition experience by many years.

In fact, states led the effort to outlaw the sale and distribution of alcohol beverages and while no state is totally "dry" today, many have areas in which alcohol beverages may not be lawfully sold.

The resulting "patchwork quilt" of state regulation was recognized as a problem more than a century ago when Congress adopted the so-called Wilson Act,

sometimes referred to as the "Original Packages Act." [2] This law had its flaws, however, and Congress subsequently adopted the Webb-Kenyon Act [3] which acted to divest alcohol beverages of their interstate commerce protection where the interstate shipment occurred in violation of state laws.

Acting pursuant to the Webb-Kenyon Act, the State of Florida commenced an action in United States District Court to permanently enjoin several out-of-state shippers from shipping alcohol beverages directly to consumers in the state in contravention of state law, which totally prohibits such shipments. However, the District Court, in *State of Florida, et al. v. Rochambeau Wines and Liquors, Inc., et al.*, No. 95-40462-WS (N.D.Fla. 1996) dismissed the state's complaint for lack of subject matter jurisdiction. The decision was upheld by the Eleventh Circuit. *Florida Department of Business Regulation v. Zachy's Wine and Liquor, Inc.*, 125 F.3rd 1399 (11th Cir. 1997). The State of Florida has filed a Petition for Certiorari asking this Court to review that decision.

SUMMARY OF ARGUMENT

In seeking to enjoin the unlawful interstate shipment of alcohol beverages into its borders, the State of Florida is merely seeking to insure compliance with its statutorily-recognized right to regulate the distribution and sale of such products. Denying states the ability to enforce their laws in federal court will subject them to the very real possibility that there may well be no venue available in which to litigate issues of compliance with state law, thus leaving out-

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[2] 27 U.S.C. § 121.

[3] 27 U.S.C. § 122.

of-state sellers free to violate state taxation and distribution law with impunity.

While the issue of state access to federal courts under the Webb-Kenyon Act has not been extensively litigated, the Eleventh Circuit opinion conflicts with an earlier holding by the Fourth Circuit and would, if allowed to stand, effectively nullify the Congress' action in adopting the Webb-Kenyon Act.

ARGUMENT

I. THE STATES' ABILITY TO EFFECTIVELY ENFORCE THEIR LAWS REGARDING DIRECT INTERSTATE SHIPMENT OF ALCOHOL BEVERAGES HAS BEEN DRASTICALLY IMPEDED BY THE ELEVENTH CIRCUIT DECISION

As indicated, it has long been recognized, both in the Twenty-First Amendment and elsewhere, that states have the authority to control the distribution and sale of alcohol beverages within their borders. Recognizing the ease with which alcohol beverages could be transported across state lines—in violation of state law in many cases—Congress long ago divested alcohol beverages of the interstate commerce protection accorded to all other lawful products.

To hold that Congress divested this protection and then left no means for the enforcement of state laws regulating interstate shipment makes a mockery of the initial Congressional action. Indeed, according to one Congressional supporter of the Webb-Kenyon Act

> The purpose (of the Act) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed

> policy regulations restricting or forbidding the sale of liquor to better enforce those regulations.[4]

Another Congressional supporter noted that "(t)he United States Government should aid in the preservation of the laws of the States rather than in their violation."[5]

Consider the enforcement options open to states should the decision of the Eleventh Circuit be upheld. If states are not able to utilize the federal court system to halt alcohol beverage shippers from violating state laws, states would have to seek to stem the growing illegal interstate flow of alcohol beverages—estimated in some quarters to be approaching $1 billion annually[6]—by seeking out carriers, such as United Parcel Service or Federal Express. But since much of the illegal interstate shipments are made in cartons not indicating the alcohol beverage contents of the package, such an effort would be ineffective. Nor could states effectively seek to enforce their laws against those state residents who receive the illegal interstate shipments. Again, this would be like looking for the proverbial "needle in a haystack."

Some would argue that the states can seek to have the federal Bureau of Alcohol, Tobacco and Firearms (BATF) enforce state law prohibitions or regulations regarding interstate alcohol beverage shipments. Critics of state action would note that BATF has made compliance with state laws, including those regulating interstate shipment, a condition of obtaining and retaining a so-called "basic permit," i.e., the right

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[4] 49 Congressional Record H2864 (daily ed. February 8, 1913).

[5] 49 Congressional Record H2840 (daily ed. February 8, 1913).

[6] W. John Moore, Sour Grapes on Capitol Hill, NATIONAL JOURNAL, November 29, 1997, at 2424.

to operate as an alcohol beverage producer or distributor.[7] But BATF's regulatory authority does not extend to brewers and retailers, so any BATF action would be discriminatory at best and, at worst, would not reach some of the major offenders in the illegal interstate alcohol beverage trade. Indeed, BATF itself filed an amicus curiae brief urging the Eleventh Circuit to allow states to enforce their own laws in federal court, stating that "Congressional enactments should not be interpreted in a manner that leaves them devoid of content." [8]

While in theory states could bring actions in state courts to enforce their prohibitions, that approach has thus far been less than successful. Florida [9] and Utah [10] have had enforcement efforts dismissed on personal jurisdiction grounds, and the defendant in a pending Missouri case [11] has cited extra-territorial activity as the major reason why it should not be adjudged to have violated state law.

These decisions are a reflection of the claims made by the illegal interstate alcohol beverage shippers, who claim that the product "sale" took place in the state where the shipper resides, that the consumer took title to the property in that foreign state and

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[7] See BATF Industry Circular 96-3, Direct Shipment Sales of Alcohol Beverages, February 11, 1997.

[8] Brief for Amicus Curiae United States of America before the Eleventh Circuit, at 9.

[9] *State of Florida, et al. v. Sam's Wines & Liquors, et al.*, Circuit Court for the Second Judicial Circuit, No. 96-3602.

[10] *The State of Utah v. Louis A. Amoroso, et al.*, Third Judicial District Court, Division II, No. 971002970-FS.

[11] *State of Missouri ex rel. Jeremiah W. (Jay) Nixon v. Beer Nuts, Ltd., d/b/a Hogs Head Beer Cellars*, Circuit Court of St. Louis City, No. 974-2076.

that the shipper merely acts as the agent for the consumer in arranging for the interstate shipment of alcohol beverages.

If state courts continue to recognize this "sham" transaction and deny state enforcement access on personal jurisdiction grounds, and if states are denied access to the federal court system under the Eleventh Circuit's rationale, the state prohibition against interstate direct shipment is a nullity.

NABCA and NCSLA submit that such a result should not be permitted.

II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT

By holding that the State of Florida did not have an implied right of access to the federal courts for the purpose of enforcing its laws regarding the illegal interstate shipment of alcohol beverages, the Eleventh Circuit placed itself in contradiction to a holding reached by the Fourth Circuit in *West Virginia v. Adams Express Co.*, 219 F. 794 (4th Cir. 1915).

In that case, the State of West Virginia sought to stop the illegal direct shipment of alcohol beverages from a seller in Ohio by seeking an injunction in state court against the carrier of the product. Adams Express was enjoined from violating the law by a state court, but then removed the matter to federal court, where a U.S. District Court judge dissolved the injunction and dismissed the suit.

However, the Fourth Circuit reversed, noting that

> The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of inter-

> state commerce that . . . liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage.[12]

Adding that Congress had not seen fit to totally exclude alcohol beverages from interstate commerce, the Court found that Congress had rather intended to exclude alcohol beverages on condition that

> they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The court can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of states of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.[13]

Having found that the Webb-Kenyon Act was designed to aid states in their regulatory activities, the Fourth Circuit reversed the District Court decision and reinstated the injunction sought by the state.

Nowhere in the Fourth Circuit opinion is there a statement or an implication that the federal courts are not an appropriate forum for states to use in pursuing their efforts to halt the illegal interstate shipment of alcohol beverages. The Eleventh Circuit opinion, at 185, noted that the subject matter jurisdiction issue remains unclear. However, if, as the Eleventh Circuit also noted, the matter could be

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[12] *West Virginia v. Adams*, at 801.

[13] *West Virginia v. Adams*, at 803.

removed to the federal courts, it appears that there is no logical reason why the federal courts should not also be an appropriate forum for an action to be initiated.

CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Eleventh Circuit and declare that, pursuant to 27 U.S.C. § 122, states have access to federal court for the purpose of enforcing state laws pertaining to the interstate shipment of alcohol beverages.

Respectfully submitted,

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